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80-1543

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1980

STEVEN L. AMDUR,

Petitioner,

vs.

THE CITY OF CHICAGO, a municipal corporation,

Respondent.

ON
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Seventh Circuit commit error when it construed *Agins* v. *City of Tiburon* to require that Petitioner must seek a building permit before attacking the constitutionality *per se* of a zoning ordinance?

2. Does Petitioner's Complaint, invoking the Fifth and Fourteenth Amendments, state a cause of action by alleging that Respondent's zoning ordinance prohibits the use of Petitioner's land for highrise construction in an area already developed with numerous highrises, selectively applies to property not improved with highrises, and denies owners of such property economically viable use of their land?

3. Does a complaint which alleges that a zoning ordinance denies a property owner economically viable use of his land state a cause of action under the Fifth and Fourteenth Amendments to the United States Constitution?

4. Upon appeal from a dismissal for want of federal jurisdiction, may a Court of Appeals decide that a complaint fails to state a cause of action on the basis of facts contradicted by the allegations in the complaint and not otherwise before the Court?

5. Does a Court of Appeals abuse its discretion by affirming an order dismissing a complaint without leave to amend, on the basis of a conclusion reached by the Court of Appeals and not reached by the District Court that the complaint fails to state a cause of action, without remanding the matter to the District Court for consideration of possible amendments to the complaint?

THE PARTIES

The Petitioner, Steven L. Amdur, was the Appellant before the United States Court of Appeals for the Seventh Circuit and the Plaintiff before the United States District Court for the Northern District of Illinois, Eastern Division.

The Respondent, the City of Chicago, was the Appellee before the Court of Appeals and the Defendant before the District Court.

Karle Meyer and North Dearborn Association petitioned for leave to intervene as defendants while this matter was in the District Court. The District Court did not rule on the Application for Intervention.

There were no other parties in the proceedings in the lower courts.

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DECISIONS BELOW

The United States District Court for the Northern District of Illinois, Eastern Division dismissed Petitioner's Complaint for want of federal jurisdiction by order dated April 18, 1980.

The United States Court of Appeals for the Seventh Circuit found that the District Court erred on the jurisdicional question but, for unrelated reasons, affirmed the District Court order by unpublished decision dated December 5, 1980. After motion by Respondent, the Court of Appeals issued its decision as a published opinion.

The Court of Appeals denied Petitioner's Petition for Rehearing by order dated January 8, 1981.

JURISDICTIONAL STATEMENT

Jurisdiction in the District Court was based on the Fifth and Fourteenth Amendments to the Constitution of the United States, 28 U.S.C. §1331, 28 U.S.C. §2201, 42 U.S.C. §1983, 42 U.S.C. §3604, and pendent jurisdiction.

Jurisdiction in the Court of Appeals was based on 28 U.S.C. §1291.

On December 5, 1980, the Court of Appeals denied Petitioner the relief requested on his appeal. On January 8, 1981, the Court of Appeals denied a Petition for Rehearing filed by Petitioner on December 19, 1980. This Petition for Writ of Certiorari will be timely if filed by mail on or before March 9, 1981.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Fourteenth Amendment to the Constitution of the United States, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Rule 15(a), Federal Rules of Civil Procedure

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

4. Chicago Zoning Ordinance

Selected portions of the Chicago Zoning Ordinance, Ch. 194A of the Municipal Code of Chicago, are attached as part of the Appendix.

5. Amendments to the Chicago Zoning Ordinance Enacted September 12, 1979

The Ordinances enacted September 12, 1979, which are the subject of Petitioner's Complaint, are attached as part of the Appendix.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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THE CITY OF CHICAGO, a municipal corporation,

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ON
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PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Factual Background

Petitioner owns property in a region of the near-north side of the City of Chicago (referred to in Petitioner's Complaint as the "Subject Area"). The Subject Area is characterized by the presence of high-density residential structures referred to in Petitioner's Complaint as "high-rises." Petitioner's property is improved with a five-story building, rented for residential uses.

For over twenty years prior to September 12, 1979, Petitioner's property was zoned R-7; the most restrictive residential zoning classification in the Subject Area was R-6. On September 12, 1979, Respondent enacted a series of ordinances (the "Ordinances") rezoning to R-5 selected Subject Area properties, Petitioner's property among them. Petitioner maintains that the Ordinances deny him protections afforded under the Fifth and Fourteenth Amendments to the Constitution of the United States.

By way of explanation,[1] the Chicago Zoning Ordinance establishes eight Residence District zoning classifications, denominated R-1 through R-8. Each classification specifies restrictions on the use of property (such as setback and sideyard requirements), with R-1 the most restrictive, and R-8 the least restrictive. Although no residential classification specifically limits the height of structures, as a practical matter height restrictions result from floor area ratio (or "FAR") restrictions which limit total buildable floor area to a specified multiple of the ground site area. The FAR restrictions for each of the residential classifications are:

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[1] The allegations in Petitioner's Complaint cannot easily be understood without reference to factual matters which are not in the record; Petitioner's Complaint was dismissed before issues were joined and evidence introduced. Therefore, the terse "notice pleading" allegations of the Complaint do not identify the nature of the proof which would be introduced in support of the Complaint. Petitioner respectfully requests the indulgence of this Court in permitting him to introduce this information; no other federal forum is currently willing to permit Petitioner either to explain why he believes his Complaint states a cause of action or to describe sets of facts under which a cause of action could be maintained.

ZONE	FAR
R-1	0.5
R-2	0.5
R-3	0.7
R-4	1.2
R-5	2.2
R-6	4.4
R-7	7.0
R-8	10.0

The allowable height of a structure is a function of the zoning classification, the area of the building site, and the portion of the building site used for the structure. For example, in an R-8 district, a structure with the same area per floor as the lot on which it is built would be limited to 10 stories, while a structure with half the area per floor as the lot on which it is built would be limited to 20 stories. Although theoretically an improvement of any desired height could be built under any zoning classification (provided that the lot was sufficiently large and the improvement occupied a sufficiently small portion of it), as a practical matter, highrise construction is impossible under R-5 zoning.

Because of the zoning classifications in effect prior to September 12, 1979, and because the Subject Area became a desirable residential location, numerous highrises were erected throughout the Subject Area. Highrises are not confined to any particular sub-region of the Subject Area.

The Ordinances were enacted at the behest of Subject Area residents who believed that too many highrises had been constructed in the Subject Area and that no more should be allowed. Respondent held a public hearing at which the supporting testimony came from representatives of those Subject Area residents who sought to restrict further highrise construction. Expert testimony was in-

troduced to show that then-existing zoning would not cause, or exacerbate, traffic problems, sewer problems, or other problems typically regulable under municipal police powers.[2] Petitioner testified that the structure on his property was in disrepair and needed to be razed and replaced, that he planned to replace the existing structure with a nine-story building, but that nine stories would not be feasible under the proposed zoning.

The Ordinances were enacted by Respondent on September 12, 1979. As a result of the Ordinances, Petitioner's property has declined in value by $400,000 and he can no longer realize a reasonable return on his investment in his property.

Petitioner filed his Complaint against Respondent in federal court, asking that an order be entered declaring the Ordinances unconstitutional, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

B. Procedural History

Petitioner's Complaint was filed on January 16, 1980.[3] On February 7, 1980, Respondent filed a motion to dismiss

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[2] Petitioner's Complaint alleged that the only purpose of the Ordinances was a moratorium on highrise construction. As hereinabove noted at Page ii, *supra*, an Application for Intervention was filed while this case was in the District Court. A memorandum filed in support of the Application sought to demonstrate that only the Ordinances could solve, or prevent, problems such as traffic and sewer congestion and landmark destruction. Petitioner filed an opposing memorandum which sought to demonstrate that the Ordinances were not rationally related to the solution or prevention of such problems, and that such concerns were addressed by existing, specific legislation.

[3] Petitioner's Complaint was in five counts. Counts I and II alleged an uncompensated "taking" and respec-

the Complaint and on February 8, 1980, a supporting memorandum. No other pleadings were filed by Respondent in the District Court.

On February 26, 1980, Karle Meyer and North Dearborn Association filed an Application to intervene as defendants, and a supporting memorandum. The Application was opposed by Petitioner and an opposing memorandum was filed on March 13, 1980. The applicants for intervention filed a reply memorandum on March 18, 1980. No ruling was made on the Application.

On April 18, 1980, the District Court entered an order dismissing Petitioner's Complaint for want of federal jurisdiction. Petitioner did not request leave to amend his Complaint to allege facts which might cure the perceived jurisdictional defect; instead Petitioner appealed the order to the Court of Appeals for the Seventh Circuit.

Oral argument was heard by the Court of Appeals on October 29, 1980. Petitioner argued that federal courts had

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[3] (Continued)
tively invoked the Fifth Amendment to the United States Constitution and the analogous provision of the Constitution of the State of Illinois. Counts III and IV alleged denial of equal protection of the laws and respectively invoked the Fourteenth Amendment to the United States Constitution and the analoguos provision of the Constitution of the State of Illinois. Count V was based on the federal Fair Housing Act, 42 U.S.C. §3604. The Court of Appeals ruled that Petitioner's Complaint failed to state a cause of action under the federal Constitution, and that Petitioner lacked standing to raise a claim under the federal Fair Housing Act. Petitioner does not challenge the ruling on standing to raise a Fair Housing Act claim. Petitioner assumes that because the Court of Appeals decided that the Complaint failed to state a cause of action under the federal Constitution, it did not reach the pendent claim under the Illinois Constitution.

jurisdiction to hear his Complaint. Respondent conceded the existence of federal jurisdiction, but argued that the order should be affirmed for failure of the Complaint to state a cause of action. Petitioner replied that if the Court of Appeals should decide that the Complaint failed to state a cause of action, the appropriate remedy would be leave to amend rather than outright dismissal.

On December 5, 1980, the Court of Appeals entered its order affirming the April 18, 1980 order of the District Court. The Court of Appeals noted that the federal court had jurisdiction over the subject matter of Petitioner's Complaint, but decided that Petitioner's Complaint failed to state a cause of action for relief under the federal Constitution. The order neither gave Petitioner leave to amend his Complaint, nor remanded the matter to the District Court for consideration of a motion for leave to amend.

On December 19, 1980, Petitioner filed a Petition for Rehearing, which was denied by order dated January 8, 1981.

ARGUMENT

Petitioner respectfully requests this Court to grant his Petition to address important questions of federal law and to exercise its power of supervision of judicial proceedings. In particular:

1. Petitioner believes that the opinion of the Court of Appeals—that a complaint, which alleges that a zoning ordinance does not advance legitimate state interests and denies an owner economically viable use of his land, fails to state a cause action under the Fifth and Fourteenth Amendments to the United States Constitution—is in conflict with the decision of this Court in *Agins* v. *City of Tiburon, infra.*

2. Petitioner believes that the opinion of the Court of Appeals—that a complaint, which alleges that a zoning ordinance was enacted to arrest the further construction of highrises in an area characterized by the presence of highrises, applies only to property not improved with highrises, and denies owners of such property economically viable use of their land, fails to state a cause of action under the Fifth and Fourteenth Amendments to the United States Constitution—is in conflict with this Court's decision in *Agins* v. *City of Tiburon, infra,* and with decisions of the Supreme Court of the State of Illinois.

3. Petitioner believes that the facts alleged in his Complaint and the surrounding set of circumstances present for decision the question raised, but not answered, in *Agins* v. *City of Tiburon, infra,* to wit: whether the enactment of a zoning ordinance which denies an owner economically viable use of his land constitutes a "taking."

4. Petitioner believes that by the action taken the Court of Appeals—deciding that Petitioner's Complaint failed to state a cause of action on the basis of facts contradicted by the allegations in the Complaint and not otherwise before the Court of Appeals—so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

5. Petitioner believes that the action taken by the Court of Appeals upon concluding that Petitioner's Complaint failed to state a cause of action—affirming an order dismissing Petitioner's Complaint without leave to amend and without remanding the matter to the District Court for consideration of possible amendments to the Complaint—so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. A PLAINTIFF IS NOT REQUIRED TO SEEK A BUILDING PERMIT TO CHALLENGE THE CONSTITUTIONALITY PER SE OF A ZONING ORDINANCE.

Speaking for the Court in *Agins* v. *City of Tiburon*, ... U.S. ....., 65 L.Ed.2d 106, 100 S.Ct. ..... (1980), Mr. Justice Powell reaffirmed the traditional elements of a federal constitutional challenge to the enactment of a zoning ordinance, 65 L.Ed.2d at 112:

> The application of the general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citation omitted], or denies an owner economically viable use of his land, [citation omitted]. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large,

> **rather than a single owner, must bear the burden of an exercise of state power in the public interest.**

The Court of Appeals perceived *Agins* to present "a remarkably similar fact situation" to the allegations in Petitioner's Complaint, as well as an identical question of law: "whether the mere enactment of the zoning ordinances constituted a taking." Although the Court of Appeals presumably accepted as true the allegations in the Complaint (Petitioner appealed from an order entered upon a motion to dismiss; but see Section D, *infra*), the Court of Appeals apparently did not regard the foregoing language from *Agins* as dispositive. Its conclusion that Petitioner's Complaint failed to state a cause of action seems to arise from three sources:

(1) An interpretation of *Agins* that application for a building permit is a precondition to challenging the constitutionality *per se* of a zoning ordinance. This is discussed in this Section A.

(2) A perceived legitimacy of the purpose of the Ordinances. This is discussed in Sections B and C, *infra*.

(3) A factual determination that the Ordinances do not deny Petitioner economically viable use of his land. This is discussed in Section D, *infra*.

The factual and legal similarity which the Court of Appeals saw in *Agins* and Petitioner's Complaint seems to be linked to the absence, in both cases, of an application for a building permit. The Court of Appeals' opinion reads:

> As in this case, appellants [in *Agins*] had not yet filed an application for a building permit, so the

> only question [in *Agins*]—and the only question here —was whether the mere enactment of the zoning ordinances constituted a taking.

It therefore appears that the Court of Appeals read the *Agins* decision to require an application for a building permit as a precondition to a constitutional challenge to a zoning ordinance, and that in the absence of such application, the only issue which can be reviewed is whether the mere enactment of a zoning ordinance constitutes a "taking."

Petitioner's Complaint did not allege that the Ordinances had been unconstitutionally applied; Petitioner challenged the Ordinances as unconstitutional *per se*. Before *Agins*, application for a building permit was held not to be a precondition to challenging the constitutionality *per se* of a zoning ordinance in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386, 71 L.Ed. 303, 47 S.Ct. 114 (1926):

> A motion was made in the court below to dismiss the bill on the ground that, because complainant [appellee] had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear.

Petitioner does not read *Agins* to overrule the foregoing holding of *Village of Euclid*.

The failure to apply for a building permit was an issue in *Agins* because this Court could not reach the question of constitutionality *per se*: there was no cognizable allegation that the Tiburon ordinances denied the complaints economically viable use of their land. The *Agins* complainants owned five acres of undeveloped land, on which, under the Tiburon ordinances, they would have been permitted to construct from one to five single-family residences. Although the *Agins* complainants alleged that the Tiburon ordinances completely prevented them from making any use whatsoever of their land, the California courts, employing a judicial notice provision of California civil procedure, rejected the allegation. This Court was bound by the application of a rule of California civil procedure. Accordingly, the *Agins* complaint failed to make those allegations which would have permitted this Court to decide whether the Tiburon ordinances were unconstitutional *per se*.

Unable to reach that question, this Court briefly examined whether it could decide if the Tiburon ordinances were unconstitutional as applied. Because the *Agins* complainants never applied for a building permit, this Court was precluded from reaching that question as well. It was for this reason, and in this context, that Mr. Justice Powell stated, "there is as yet no concrete controversy regarding the *application* of the specific zoning provisions," 65 L.Ed.2d at 111 [emphasis added]. There was no suggestion in *Agins* that application for a building permit was required to test the constitutionality *per se* of a zoning ordinance.

Furthermore, resort to administrative remedies is seldom demanded when doing so will be a futile gesture; see, e.g., *Van Laten* v. *City of Chicago*, 28 Ill.2d 157, 190

N.E.2d 717 (Ill. S.Ct. 1963). If, as Petitioner alleges, he cannot make an economically viable use of his property under R-5 zoning, then no purpose would be served by applying for a building permit; any economically viable use of his property for which Petitioner might seek a permit would necessarily be denied as impermissible under R-5 zoning. Petitioner does not read *Agins* to require an exercise in futility to test the constitutionality *per se* of a zoning ordinance.

Petitioner believes that his Complaint alleges that the Ordinances do not substantially advance legitimate state interests and deny him economically viable use of his land; for the reasons reaffirmed in *Agins*, Petitioner concludes that his Complaint states a cause of action under the Fifth and Fourteenth Amendments to the United States Constitution. The Court of Appeals read *Agins* to make application for a building permit a precondition to challenging the constitutionality *per se* of a zoning ordinance. Petitioner submits that this Court should grant this Petition to clarify any such misunderstanding.

B. A COMPLAINT STATES A CAUSE OF ACTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS BY ALLEGING THAT A ZONING ORDINANCE WAS ENACTED TO ARREST THE FURTHER CONSTRUCTION OF HIGHRISES IN AN AREA ALREADY DEVELOPED WITH NUMEROUS HIGHRISES, SELECTIVELY APPLIES TO PROPERTY NOT IMPROVED WITH HIGHRISES, AND DENIES AN OWNER OF SUCH PROPERTY ECONOMICALLY VIABLE USE OF HIS LAND.

Petitioner's Complaint alleged that the Ordinances were enacted to arrest further construction of highrises in an area characterized by the presence of highrises. Peti-

tioner's Complaint further alleged that the Ordinances were selective in their application, imposing their economic burdens only upon property not already improved with highrises. The Court of Appeals for the Seventh Circuit seemingly accepted the truth of Petitioner's allegations, but neither questioned nor discussed whether the alleged purpose was permissible. Instead, the Court of Appeals focused on the selective application and concluded that there was a "rational relationship" between the purpose of the Ordinances and the means employed to achieve the purpose:

> The Chicago ordinance, however, affects areas of the city that are already highly developed. The City of Chicago could not very well "downzone" land on which high-rises had already been constructed. The zoning ordinances in dispute here limit construction on every parcel not already developed beyond the limits in the new ordinance. The city could do no more than that.

Implicit in the Court of Appeals' silence on the question of the legitimacy of the purpose of the Ordinances is either (1) an unarticulated rule that in evaluating a zoning ordinance, only the rationality of the relationship between its means and its purpose—and not the legitimacy of its purpose—need be examined, or (2) an unarticulated finding that, as a matter of law, the alleged purpose (moratorium on highrise construction) is, or substantially advances, a legitimate state interest. Petitioner submits that if the Court of Appeals applied the former rule, its opinion is in conflict with this Court's decision in *Agins*, and that if the Court of Appeals made the latter finding, its opinion is in conflict with opinions of the Supreme Court of the State of Illinois.

As Mr. Justice Powell reaffirmed in *Agins*, a zoning ordinance which "does not substantially advance legitimate

state interests" may effect an unconstitutional taking. At the heart of a constitutional challenge to a zoning ordinance is the legitimacy of purpose, and not simply the relationship between the means and purpose. If the purpose is not legitimate, the rational relationship properly should be irrelevant; Petitioner knows of no ruling by this Court sustaining an otherwise impermissible exercise of state or municipal power, solely because the impermissible purpose was achieved by rationally related means.

In the alternative, the Court of Appeals may have found, *sub silentio,* that the alleged purpose was, as a matter of law, a legitimate exercise of Respondent's municipal powers. Petitioner believes that such a finding is in conflict wtih the opinions of the Illinois Supreme Court on constitutional zoning law.

In *Village of Euclid, supra,* 272 U.S. at 395, Mr. Justice Sutherland declared that:

> [I]t must be said before [a zoning] ordinance can be declared unconstitutional, that [its] provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

Mr. Justice Stevens observed in *Moore* v. *East Cleveland,* 431 U.S. 494, 514, 515, 52 L.Ed.2d 531, 97 S.Ct. 1932 1977), that:

> The case-by-case development of the constitutional limits on the zoning power has not . . . taken place in this Court. On the other hand, during the past half century the broad formulations found in Euclid . . . have been applied in countless situations by the state courts.

Constitutional zoning law has evolved in Illinois in the years since *Euclid*; in particular, Illinois courts have

identified criteria for determining when a zoning ordinance is arbitrary, unreasonable and does not substantially advance legitimate state interests. These criteria were summarized by the Illinois Supreme Court in *LaSalle National Bank of Chicago* v. *County of Cook*, 12 Ill.2d 40, 46, 47, 145 N.E.2d 65 (Ill. S.Ct. 1957):

> [A]mong the facts which may be taken into consideration in determining the validity of an ordinance are the following: (1) The existing uses and zoning of nearby property [citations omitted], (2) the extent to which property values are diminished by the particular zoning restrictions [citations omitted], (3) the extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public [citations omitted], (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner [citation omitted], (5) the suitability of the subject property for the zoned purposes . . . [citations omitted], and (6) the length of time the property has been . . . as zoned considered in the context of land development in the area in the vicinity of the subject property.

Petitioner believes that examining the allegations of his Complaint in the context of the *LaSalle National Bank* criteria demonstrates the arguable invalidity of the Ordinances—particularly when, by way of contrast, the same criteria are applied to the "remarkably similar fact situation" presented in *Agins*.

In *Agins*, the City of Tiburon was apparently concerned with threatened overdevelopment of Tiburon Ridge, land then open and undeveloped, five acres of which were owned by the *Agins* complainants. The Tiburon ordinances restricted Tiburon Ridge to open space use or, if developed, to between 0.2 and 1.0 single-family

residential dwellings per acre. Applying the *LaSalle National Bank* criteria to *Agins*: there were no existing uses of land nearby the property owned by the *Agins* complainants—the Ridge was undeveloped. Restricted residential development was therefore consistent with nearby land uses, as was the zoning imposed on the nearby property. The *Agins* opinion recited the legitimacy of the purpose for enacting the Tiburon ordinances, and noted that the *Agins* complainants would share both their benefits and their burdens with all other owners of Tiburon Ridge property.

The fact situation alleged in Petitioner's Complaint is markedly different. During the time that Petitioner's property had been zoned R-7, the Subject Area had experienced considerable highrise development. While Petitioner's property is now downzoned to R-5, nearby uses are highrises and nearby zoning ranges from R-6 to R-8. The destruction of Petitioner's property values bears no relationship to the health, safety, morals or general welfare of the public, such considerations being fully protected by other municipal ordinances. The gain to the public is not borne by the public; Petitioner may share the "benefits" of the Ordinances with other Subject Area residents, but the burdens are selectively imposed on him and similarly-circumstanced property owners. Petitioner's property is suitable for uses permitted under the pre-existing zoning, but is not suitable for uses permitted under the R-5 zoning of the Ordinances.

In *Agins,* the complainants owned undeveloped land on which they would be permitted to build between one and five single family residences; the California courts took judicial notice of this fact and rejected the allega-

tion that the Tiburon ordinances completely destroyed the value of the land for residential uses. Petitioner's property, however, is already improved, currently uneconomical and, because of the Ordinances, cannot be made economically productive.

Under the Illinois Supreme Court's interpretation of the Fifth Amendment to the United States Constitution, as articulated in *La Salle National Bank, supra,* and other cases, whether a zoning ordinance is arbitrary and unreasonable depends on a variety of factual considerations, focusing largely on the uses and zoning of nearby property and the relationship between the gain to the public and the burdens imposed on the individual property owner. The Court of Appeals ignored the questionable legitimacy of the purpose of the Ordinances and confined its discussion to whether the means related rationally to the purpose.

This Court is not asked to decide whether a zoning ordinance which fails to meet the *LaSalle National Bank* criteria is, in fact, unconstitutional. This Court is asked to decide whether these criteria are germane to the analysis, and whether a complaint which alleges that a zoning ordinance fails to meet these criteria states a cause of action under the Fifth and Fourteenth Amendments to the Constitution of the United States. Petitioner believes that his Complaint sufficiently alleges that the Ordinances are constitutionally defective that the factual issues in support thereof should be decided by a trial on the merits.

C. A COMPLAINT ALLEGING THAT A ZONING ORDINANCE WHICH COULD HAVE ACHIEVED ITS PURPOSE THROUGH CONDEMNATION, WHICH IS SELECTIVE IN ITS APPLICATION, AND WHICH DENIES AN OWNER OF AFFECTED PROPERTY ECONOMICALLY VIABLE USE OF HIS LAND STATES A CAUSE OF ACTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In *Agins*, this Court was asked to decide "whether a zoning ordinance that prohibits all development of [an owner's] land effects a taking under the Fifth and Fourteenth Amendments." This Court did not reach that question because it was bound by a determination of the California courts that the *Agins* complaint failed to allege prohibition of all development; see discussion at Page 11, *supra*. No such pleading defect appears in Petitioner's Complaint; Petitioner submits that the question is presented herein under circumstances which make its decision appropriate.[4]

The Subject Area was the site of considerable highrise construction in the twenty years proceeding the enactment of the Ordinances. The Ordinances were passed at the behest of Subject Area residents who sought to curb further highrise construction in the Sub-

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[4] Not all of the factual matters discussed in this Section C are alleged in Petitioner's Complaint. Because a complaint should not be dismissed for failure to state a cause of action unless there exists no set of circumstances under which the complainant would be entitled to relief, and because the Court of Appeals in effect denied Petitioner leave to amend his Complaint, Petitioner again respectfully requests the indulgence of this Court in permitting him to discuss matters which are not part of the record.

ject Area. Assuming, *arguendo,* the legitimacy of the purpose of the Ordinances, Petitioner submits that their selective application, their similarity to condemnation, and the resultant destruction of property values is a "taking" prohibited by the Fifth Amendment to the United States Constitution if uncompensated.

Factored into the price of land in the Subject Area (and anywhere else) are uses to which the land can be put. Prior to September 12, 1979, the market value of Petitioner's property was the sum of several components including square footage of the ground, location of the site, condition of the structure thereon—and a component based on potential use under the then-existing R-7 zoning. This last component is roughly equivalent to the fair market value of air space above the existing structure; prior to enactment of the Ordinances, Petitioner had value in, and could have sold, the air rights above the existing structure.

Had Petitioner in fact sold the air rights above the existing structure prior to enactment of the Ordinances, he would have retained the ground and the right to build up the height of the existing structure. The proceeds of the sale of the air rights would have been available to Petitioner either to finance the remodeling or replacement of the existing structure, or to invest elsewhere. The purchaser would have acquired the right to build above the height of the existing structure. Structures such as the Merchandise Mart and Prudential Insurance Building in Chicago demonstrate that air rights are valuable property interests.

An alternative to downzoning the selected Subject Area properties would have been condemnation and purchase of the air rights above each downzoned structure.

The condemnation alernative would have accomplished precisely the alleged purpose of the Ordinances, the only difference being that by downzoning, Respondent achieved its purpose without having to pay for it. The effect may be seen in starker form by examining the Ordinances in the context of a hypothetical sale of Petitioner's air rights: in such a circumstance, while Petitioner's property values and interests would have remained intact, the purchaser would have lost 100% of the property acquired.

The foregoing argument is not meant to suggest that if a purpose can be achieved both by zoning and by condemnation, to achieve it by zoning is constitutionally impermissible. Although land use regulation typically cannot be achieved by condemnation, (e.g., whether residential or industrial use will be permitted), many zoning laws place severe restrictions on the use of property without running afoul of the Fifth Amendment. For example, residential communities typically are uniformly zoned for low-density uses, with sideyard and setback requirements which deprive owners of the right to make any use of their property within designated distances from the lot lines, and floor area ratio (or equivalent) requirements which effectively limit the height of improvements. Such restrictions could also be achieved by condemnation, but are not unconstitutional because they are achieved through zoning. Although such zoning restrictions are a "burden" in the sense that they restrict an owner's freedom to use his property in any way he pleases, they are in fact an economic benefit. A component of the market value of each house in such a community is the reasonable expectancy that the house next door will not be torn down and replaced with a factory. Equivalently, property values in residential districts

would drop if that expectancy were lost by a rezoning which permitted industrial uses. Thus, the effect of a zoning restriction cannot be determined unless its context is known. A restriction on the use of property may be an economic benefit in one location and a severe burden in another.

In this economic sense (in addition to their inequitable application) the Ordinances differ from typically permissible land use regulation. The market value of downzoned property dropped as a result of their enactment; the overall effect of the Ordinances was a loss in value. (Conceivably, the market value of highrise properties could have risen because of the new expectancy that no more highrises will be built—in which case the Ordinances would have "taken" value from one class of property owners and "given" it to the other class.)

The zoning law challenged in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978) presents a useful contrast to the Ordinances challeged by Petitioner. Although New York's Landmarks Preservation Law placed severe restrictions on the use of affected property, the law permitted development rights lost because of such restrictions to be transferred to adjacent property. Indeed, "the major theme of the law is to insure the owners of any such properties . . . a 'reasonable return' on their investment . . . ," 438 U.S. at 110. There was no question that the New York law served a legitimate purpose, and Penn Central conceded that the law would not prevent it from realizing a reasonable return on its investment. This Court thus decided that the New York law did not "take" Penn Central's property in violation of the Fifth and Fourteenth Amendments; in terms of

Mr. Justice Powell's *Agins* analysis, the New York law substantially advanced legitimate state interests and did not deny the property owner economically viable use of its land. For this reason, this Court did not reach a secondary question, whether the transferability of development rights is "just compensation" which would cure an otherwise unconstitutional "taking." In any case, the New York law at least showed some concern for its impact on property values. No such *quid pro quo* exists in the Ordinances challenged by Petitioner: they "take" without "giving" anything in return.

Mr. Justice Powell stated in *Agins, supra,* 65 L.Ed. 2d at 112:

> The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.

Petitioner believes that the Ordinances are condemnation disguised as zoning. Petitioner believes that if arresting highrise development in the Subject Area substantially advances Respondent's legitimate interests, then the burden should not be borne by owners of downzoned property alone, but should be shared by the community. Petitioner submits that when, as here, the objectives of a zoning ordinance can be accomplished by condemnation, and where, as here, the burden of the ordinance is imposed on a few rather than shared by all, an ordinance which deprives an owner of economically viable use of his land effects a "taking," unconstitutional if without just compensation.

D. THE COURT OF APPEALS ABUSED ITS DISCRETION BY DECIDING THAT THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION ON THE BASIS OF FACTS CONTRADICTED BY THE ALLEGATIONS IN THE COMPLAINT AND NOT OTHERWISE BEFORE THE COURT.

Is is axiomatic that in ruling on a motion to dismiss, all well-pleaded allegations of the complaint are to be taken as true; *Kugler* v. *Helfant*, 421 U.S. 117, 44 L.Ed. 2d 15, 95 S.Ct. 1524 (1975).

In deciding that Petitioner's Complaint failed to state a cause of action, and in particular in deciding that the allegations in Petitioner's Complaint presented "a remarkably similar fact situation" to the facts in *Agins* v. *City of Tiburon, supra,* the Court of Appeals relied on factual assertions which are contradicted by the allegations in the Complaint.

Petitioner alleged that the Ordinances denied him economically viable use of his property. In specific, Petitioner alleged that as a result of the Ordinances, the value of his property diminished by $400,000.00, he was rendered economically unable to demolish and replace the existing structure, and he was no longer able to realize a reasonable return on his investment in his property. In contradistinction, the Court of Apeals perceived the facts as follows:

> Similarly [to *Agins*], in this case Amdur may still build on his property. He simply may not construct as large a high-rise as he had planned.

The foregoing statement presumes that Petitioner had "planned" to build a highrise, and that Petitioner still retains (under the Ordinances) some flexibility in terms of the kind of highrise he can build. Although Petitioner

did have plans for his property, his plans were neither disclosed nor germane to his lawsuit; thus, the statement that Petitioner cannot "construct as large a highrise as he had planned" is incomprehensible. Furthermore, the Complaint specifically alleges (in Paragraph 8) that under R-5 zoning, "highrise construction is not permissible." Therefore, even assuming that Petitioner had "planned" to build a highrise, it is difficult to understand how the Court of Appeals—ruling on an appeal from an order entered upon a motion to dismiss—could have concluded that under R-5, a highrise can still be constructed, albeit "not as large as planned."

Highrise construction requires more than appropriate zoning: It requires assembly of a lot of sufficient size to support a multi-story structure (see discussion at pp. 2-3, *supra.*) In fact, Petitioner neither "planned" to build a highrise on his property, nor "planned" to assemble his property into a tract suitable for a highrise. Petitioner planned to erect a structure which, in Chicago at least, and certainly in the Subject Area, hardly would have been characterized as a "highrise."

But even assuming that Petitioner's contemplated structure was just the sort of "highrise" the Ordinances sought to prohibit, there is simply no justification for the Court of Appeals' conclusion that Petitioner "may still build on his property." Petitioner assumes that the Court of Appeals understood that, unlike the *Agins* complainants, Petitioner owns land on which a building presently exists and that remodeling, or demolition, costs must be factored into an economic analysis of his use of his property. In a technical sense, the Court of Appeals is correct: Petitioner can spend the money to demolish the existing structure and replace it with improvement

permissible under R-5; but as Petittioner has alleged, he cannot do so economically—translated, he can only do so at a loss. Surely, the Court of Appeals is not to be understood to say that a zoning ordinance does not deny an owner economically viable use of his land if he can continue to use his land at a loss.

An evaluation of the uses to which Petitioner's property may be put requires an economic analysis and information which are not in the record. Perhaps Respondent will be able to prove that Petitioner can make an economically viable use of his property; Respondent's motion to dismiss, however, assumes the truth of Petitioner's allegations.

Because there is no economic information in the record, there is no way to justify the Court of Appeals' presumption that Petitioner can somehow do what he alleges he cannot. Petitioner believes that the economic impact of the Ordinances is a question of fact, to be decided at trial, and not summarily by a Court of Appeals lacking the information necessary to make a factual determination.

E. THE COURT OF APPEALS ABUSED ITS DISCRETION BY AFFIRMING AN ORDER DISMISSING THE COMPLAINT WITHOUT LEAVE TO AMEND, ON THE BASIS OF A CONCLUSION REACHED BY THE COURT OF APPEALS AND NOT REACHED BY THE DISTRICT COURT THAT THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION, WITHOUT REMANDING THE MATTER TO THE DISTRICT COURT FOR CONSIDERATION OF POSSIBLE AMENDMENTS TO THE COMPLAINT.

When Petitioner's Complaint was dismissed in the District Court, the reason for the dismissal was want of

federal jurisdiction. Petitioner did not request leave to amend his Complaint to cure jurisdictional defects; instead, Petitioner appealed the order, and was vindicated by the Court of Appeals which held that "the District Court has subject matter jurisdiction over the action."

The Court of Appeals then proceeded to affirm the District Court "on grounds different from those relied on by the District Court," to wit: that Petitioner's Complaint failed to state a cause of action under the Fifth and Fourteenth Amendments to the United States Constitution. The Court of Appeals neither affirmed with leave to amend, nor remanded the matter to the District Court to consider possible amendments. The Court of Appeals denied a Petition for Rehearing, which, *inter alia,* drew these omissions to its attention.

Petitioner thus finds himself potentially stranded by affirmance of an order dismissing his Complaint without leave to amend, having learned for the first time from the Court of Appeals that his Complaint fails to state a cause of action.

Inherent in the structure of the Federal Rules of Civil Procedure is a liberal policy toward amendment of pleadings. This policy was stated in *Foman* v. *Davis,* 371 U.S. 178, 182, 9 L.Ed.2d 222, 83 S.Ct. 227 (1962) as follows:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. . . . Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court,

> but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

This principle is not unknown to the Seventh Circuit, which stated in *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1334 (7th Cir. 1977):

> Fed.R.Civ.P. 15(a) . . . provides that "leave shall be freely given when justice so requires," and this circuit has adopted a liberal policy respecting amendments to pleadings so that cases may be decided on the merits and not on the basis of technicalities. . . . "[L]eave to amend should be freely given unless it appears to a certainty that plaintiff would not be entitled to any relief under any state of facts which could be proved in support of his claim."

If it is assumed that Petitioner's Complaint is not sufficiently well-pleaded to survive a motion to dismiss, nevertheless the Complaint should not be dismissed without leave to amend unless "it appears to a certainty" that there is no set of facts under which Petitioner would be entitled to any relief.

Petitioner believes that his Complaint contains sufficient allegations of fact to permit the conclusion that the Ordinances do not substantially advance legitimate state interests and deny Petitioner economically viable use of his land. Petitioner believes that any defect in his Complaint, which may have caused the Court of Appeals to perceive a factual similarity between his Complaint and *Agins*, can be cured by more specific pleadings. Petitioner further believes that any perceived defect in the allegations of *per se* impermissibility of the Ordinances can, if this Court rules on the question discussed in Sec-

tion C, *supra,* be cured by specific allegations as to the similarity between the Ordinances and air rights condemnation.

The action taken by the Court of Appeals—affirming an order dismissing the Complaint without leave to amend, and without remand to the District Court for consideration of possible amendments—runs contrary to its announced procedure in such circumstances. This policy is highlighted in two cases, *Cohen* v. *Illinois Institute of Technology,* 524 F.2d 818 (7th Cir. 1975) ["Cohen I"] and *Cohen* v. *Illinois Institute of Technology,* 581 F.2d 658 (7th Cir. 1978) ["Cohen II"]. *Cohen I* reviewed a District Court order dismissing a complaint for failure to state a cause of action; the appellant presumably chose to appeal rather than seek leave to amend the complaint. The dismissal was affirmed in *Cohen I.* Appellant thereupon sought leave to amend the complaint in the District Court, which request was denied. The denial became the subject of *Cohen II,* in which the Court of Appeals stated, 581 F.2d at 662:

> [Appellee's] initial contention that [Appellant] had no right to amend because she elected to stand on her complaint and lost on appeal is without merit. Amendment in either the appellate or trial court is generally not allowed in such situations. . . However, an amendment can be allowed with leave of the Court of Appeals. [Citations omitted] This may be accomplished either by the appellate court itself granting leave to amend *or by remanding to the District Court to consider the motion. . . . The practice in this Circuit ordinarily is to remand for consideration,* . . . [Emphasis added]

In the case of Petitioner, however, the Court of Appeals applied a different standard. Having decided that Peti-

tioner's Complaint did not state a cause of action—a conclusion not theretofore reached in any court—the Court of Appeals, contrary to its announced practice, did not remand the matter to the District Court for further consideration; instead, the Court of Appeals affirmed an order dismissing Petitioner's Complaint.

Petitioner submits that the discussion in Sections A through D, *supra*, demonstrate that there are facts under which he would arguably be entitled to relief. If this Court is unpersuaded that his Complaint alleges those facts, Petitioner respectfully requests that he be given the opportunity to amend his Complaint to do so.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

The Chicago Zoning Ordinance (Chapter 194A of the Municipal Code of Chicago) describes and depicts the zoning of all property in the City of Chicago.

Article 7 of the Chicago Zoning Ordinance describes the zoning restrictions applicable to Residence Districts. Section 6 of Article 7 contains the floor area ratio restrictions in Residence Districts.

Each annual publication of the Chicago Zoning Ordinance includes the zoning amendments for the previous year.

Attached hereto as Exhibit 1 is Section 7.6 of the Chicago Zoning Ordinance (floor area ratio restrictions in Residence Districts).

Attached hereto as Exhibit 2 are the 1979 zoning amendments (as reproduced in the 1980 annual publication of the Chicago Zoning Ordinance) described in this Petition as the Ordinances.

Attached hereto as Exhibits 3, 4, 5 and 6, respectively, are the text of the April 18, 1980 order of the District Court, dismissing Petitioner's Complaint for want of federal jurisdiction; the December 5, 1980 opinion of the Court of Appeals, affirming the District Court; the text of the Court of Appeals' judgment order affirming the order of the District Court; and the text of the January 8, 1981 order of the Court of Appeals denying Petitioner's Petition for Rehearing.

EXHIBIT 1

7.6 Floor Area Ratio—Use and Bulk Regulations.

The maximum floor area ratio of buildings or structures on a lot shall be as follows:

7.6-1 Maximum Floor Area Ratio—R1 Single-Family Residence District.

In an R1 District, the floor area ratio shall not exceed 0.5.

7.6-2 Maximum Floor Area Ratio—R2 Single-Family Residence District.

In an R2 District, the floor area ratio shall not exceed 0.5.

7.6-3 Maximum Floor Area Ratio—R3 General Residence District.

In an R3 District, the floor area ratio shall not exceed 0.7, except that where the front, rear or side lot line of a lot adjoins a public open space which is at least five acres in area and of a depth perpendicular to such front, rear or side lot line of not less than 200 feet, the floor area ratio may be increased to 0.8. (Amend. Coun. J. 11-28-66, p. 7597.)

7.6-4 Maximum Floor Area Ratio—R4 General Residence District.

In an R4 District, the floor area ratio shall not exceed 1.2, except that where the front, rear or side lot line of a lot adjoins a public open space which is at least five acres in area and of a depth perpendicular to such front, rear, or side lot line of not less than 200 feet, the floor area ratio may be increased to 1.4. (Amend. Coun. J. 11-28-66, p. 7597.)

7.6-5 Maximum Floor Area Ratio—R5 General Residence District.

In an R5 District, the floor area ratio shall not exceed 2.2, except that where the front, rear or side lot line of a lot adjoins a public open space which is at least five acres in area and of a depth perpendicular to such front. rear or side lot line of not less than 200 feet, the floor area ratio may be increased to 2.5. (Amend. Coun. J. 11-28-66, p. 7597.)

7.6-6 Maximum Floor Area Ratio—R6 General Residence District.

In an R6 District, the floor area ratio shall not exceed 4.4, except as provided in paragraphs (1) and (2) hereinafter.

(1) Where the front, rear or side lot lines of a lot adjoins a public open space which is at least five acres in area and of a depth perpendicular to such front, rear or side lot line of not less than 200 feet, the floor area ratio may be increased to 5.0. (Amend. Coun. J. 11-28-66, p. 7597.)

(2) Where a multiple-family dwelling containing 50 or more dwelling units comes within the permissible floor area ratio limits, as heretofore established, floor area ratio premiums may be added to such permissible floor area ratio in accordance with each one of the following.

a. For each 1.0 per cent decrease in allowable number of dwelling units less than permitted, there shall be a proportionate increase of 1.0 per cent, not to exceed 15.0 per cent, in the permissible floor area ratio.

b. For each additional 2.0 per cent decrease in allowable number of dwelling units less than permitted, there

shall be a proportionate increase of 1.0 per cent, not to exceed 10.0 per cent, in the permissible floor area ratio. (Amend. Coun. J. 10-13-64, p. 3268.)

7.6-7 Maximum Floor Area Ratio—R7 General Residence District.

In an R7 District, the floor area ratio shall not exceed 7.0, except as provided in paragraphs (1) and (2) hereinafter:

(1) Where the front, rear or side lot line of a lot adjoins a public open space which is at least five acres in area and of a depth perpendicular to such front, rear or side lot line of not less than 200 feet, the floor area ratio may be increased to 8.0. (Amend. Coun. J. 11-28-66, p. 7598.)

(2) Where a multiple-family dwelling containing 50 or more dwelling units within the permissible floor area ratio limits, as heretofore established, floor area ratio premiums may be added to such permissible floor area ratio in accordance with each one of the following.

a. For each 1.0 per cent decrease in allowable number of dwelling units less than permitted, there shall be a proportionate increase of 1.0 per cent, not to exceed 15.0 per cent, in the permissible floor area ratio.

b. For each additional 2.0 per cent decrease in allowable number of dwelling units less than permitted, there shall be proportionate increase of 1.0 per cent, not to exceed 10.0 per cent, in the permissible floor area ratio. (Amend. Coun. J. 10-13-64, p. 3268.)

7.6-8 Maximum Floor Area Ratio—R8 General Residence District.

In an R8 District, the floor area ratio shall not exceed 10.0 except as provided in paragraphs (1) and (2) hereinafter.

(1) Where the front, rear or side lot line of a lot adjoins a public open space which is at least five acres in area and of a depth perpendiculaar to such front, rear or side lot line of not less than 200 feet, the floor area ratio may be increased to 11.5. (Amend. Coun. J. 11-28-66, p. 7598.)

(2) Where a multiple-family dwelling containing 50 or more dwelling units comes within the permissible floor area ratio limits, as heretofore established, floor area ratio premiums may be added to such permissible floor area ratio in accordance with each one of the following:

a. For each 1.0 per cent decrease in allowable number of dwelling units less than permitted, there shall be a proportionate increase of 1.0 per cent, not to exceed 15.0 per cent, in the permissible floor area ratio.

b. For each additional 2.0 per cent decrease in allowable number of dwelling units less than permitted, there shall be a proportionate increase of 1.0 per cent, not to exceed 10.0 per cent, in the permissible floor area ratio. (Amend. Coun. J. 10-13-64, p. 3268.)

EXHIBIT 2

ZONING MAP AMENDMENTS PASSED COUN. J. 9-12-79, p. 824-827.

Map No. 3-F; Zoning Book Page No. 86B.

That the Chicago Zoning Ordinance be amended by changing all the R6 and R7 General Residence District symbols and indications as show on Map No. 3-F in the area bounded by

> W. Goethe Street; N. State Parkway; a line 270.33 feet South of and parallel to W. Goethe Street; the alley next East of N. Dearborn Parkway; a line 292.83 feet South of W. Goethe Street; N. Dearborn Parkway; a line 170 feet North of W. Division Street; the alley next west of N. Dearborn Parkway; a line 218.94 feet South of W. Goethe Street, N. Dearborn Parkway; a line 142.83 feet South of W. Goethe Street; and the alley next East of N. Dearborn Parkway (Map No. 3-F),

to those of an R5 General Residence District.

Map No. 3-E; Zoning Book Page No. 87B.

That the Chicago Zoning Ordinance be amended by changing all the R7 General Residence District symbols and indications as shown on Map No. 3-E in the area bounded by

> a line 83 feet south of E. Schiller Street; a line from a point 119.84 feet east of N. State Parkway and 83 feet south of E. Schiller Street to a point 130.6 feet east of N. State Parkway and 218 feet south of E. Schiller Street; a line 218 feet south of E. Schiller Street; and N. State Parkway

to those of an R5 General Residence District.

That the Chicago Zoning Ordinance be amended by changing all the R7 General Residence District symbols and indications as shown on Map No. 3-E in the area bounded by

> a line 135 feet south of E. Burton Place; the alley next east of N. State Parkway; a line 200 feet north of E. Schiller Street; and N. State Parkway

to those of an R5 General Residence District.

That the Chicago Zoning Ordinance be amended by changing all the R7 General Residence District symbols and indications as shown on Map No. 3-E in the area bounded by

> E. North Boulevard; N. Astor Street; a line 285 feet south of E. North Boulevard; the alley next east of N. Astor Street; a line 325 feet south of E. North Boulevard; N. Astor Street; a line 127 feet north of E. Burton Place; the alley next east of N. Astor Street; E. Schiller Street; a line 125 feet east of and parallel to N. Astor Street; a line 83 feet south of E. Schiller Street; a line 150 feet east of and parallel to N. Astor Street; a line 163 feet south of E. Schiller Street; a line 125 feet east of and parallel to N. Astor Street; a line 184.5 feet south of E. Schiller Street; a line 90 feet east of and parallel to N. Astor Street; a line 223.5 feet south of E. Schiller Street; N. Astor Street; E. Schiller Street; the alley next east of N. State Parkway; a line 355 feet south of E. Burton Place; N. Astor Street; a line 255 feet south of E. Burton Place; the alley next east of N. State Parkway; a line 100 feet south of E. Burton Place; N. Astor Street; E. Burton Place; the alley next east of N. State Parkway; a line 140 feet north of E. Burton Place; and N. State Parkway

to those of an R5 General Residence District.

That the Chicago Zoning Ordinance be amended by changing all the R7 General Residence District symbols and indications as shown on Map No. 3-E in the area bounded by

> E. Banks Street; N. Astor Street; a line 54.83 feet south of the alley next south of E. Banks Street as measured along the west line of N. Astor Street; a line 46 feet east of the alley next east of N. State Parkway; E. Goethe Street; a line 80 feet east of the alley next east of N. State Parkway; a line 91 feet south of E. Goethe Street; N. Astor Street; E. Goethe Street; a line 71 feet east of N. Astor Street as measured along the north line of E. Goethe Street; a line 100 feet north of E. Goethe Street; N. Ritchie Court; the east line of Union (Goudy) Square; the alley next east of N. Astor Street; E. Division Street; N. Astor Street; the alley next north of E. Division Street; a line 120 feet east of the alley next east of N. State Parkway; E. Division Street; the alley next east of N. State Parkway; a line 27 feet north of E. Division Street; N. State Parkway; a line 107 feet north of E. Division Street; the alley next east of N. State Parkway; E. Scott Street; a line 50 feet east of the alley next east of N. State Parkway; the alley next north of E. Scott Street; the alley next east of N. State Parkway; a line 44.66 feet north of N. Scott Street; N. State Parkway; a line 116 feet south of E. Goethe Street; the alley next east of N. State Parkway; a line 66 feet south of E. Goethe Street; a line 75 feet east of N. State Parkway; E. Goethe Street; and the alley next east of N. State Parkway

to those of an R5 General Residence District.

That the Chicago Zoning Ordinance be amended by changing all the R7 and R8 General Residence District symbols and indications as shown on Map No. 3-E in the area bounded by

E. Division Street; a line 200 feet west of the alley next west of Lake Shore Drive; the alley next south of E. Division Street; a line 327.6 feet west of Lake Shore Drive at E. Elm Street (north side); E. Elm Street; a line 358.9 feet west of Lake Shore Drive at E. Elm Street (south side); a line 109.5 feet south of E. Elm Street; a line 277.12 feet west of Lake Shore Drive (south side); E. Elm Street; a line 277.6 feet west of Lake Shore Drive (north side); the alley next south of E. Division Street; a line 46 feet west of the alley next west of N. Lake Shore Drive; E. Division Street; the alley next west on N. Lake Shore Drive; the alley next south of E. Division Street; a line 152.6 feet west of N. Lake Shore Drive at E. Elm Street (north side); E. Elm Street; a line 130.9 feet west of Lake Shore Drive at E. Elm Street (south side); a line 109.5 feet south of E. Elm Street; a line 260 feet west of Lake Shore Drive at E. Cedar Street (north side); E. Cedar Street; the alley next west of Lake Shore Drive; the alley next south of E. Cedar Street; a line 416 feet west of N. Lake Shore Drive at E. Bellevue Place (north side); E. Bellevue Place; the alley next west of N. Lake Shore Drive; the alley next south of E. Bellevue Place; the alley next east of N. Rush Street; E. Bellevue Place; the alley next east of N. Rush Street; a line 73.5 feet south of E. Cedar Street; a line 127 feet east of N. Rush Street at E. Cedar Street; (south side); E. Cedar Street; a line 234.75 feet east of N. Rush Street at E. Cedar Street (south side); the alley next south of E. Cedar Street; a line 92 feet east of the alley next east of N. Rush Street; E. Bellevue Place; a line 529 feet west of N. Lake Shore Drive; the alley next south of E. Cedar Street; a line 389 feet west of the alley next west of N. Lake Shore Drive; E. Cedar Street; a line 544.5 feet west of N. Lake Shore Drive at E. Cedar Street (north side); a line 145 feet north of E. Cedar Street; a line 149.3 feet east of N. Rush

Street at E. Cedar Street (north side); E. Cedar Street; a line 122.8 feet east of N. Rush Street at E. Cedar Street (north side); a line 77 feet north of E. Cedar Street; a line 118.5 feet east of N. Rush Street at E. Elm Street (south side); E. Elm Street; a line 330 feet east of N. State Street; the alley next south of E. Division Street; and the alley next east of N. State Street

to those of an R5 General Residence District.

Map No. 3-F; Zoning Book Page No. 86B.

That the Chicago Zoning Ordinance be amended by changing all the R7 General Residence District symbols and indications as shown on Map No. 3-E in the area bounded by

W. North Boulevard; N. Dearborn Parkway; a line 50 feet south of and parallel to W. North Boulevard; the alley next east of N. Dearborn Parkway; a line 318.5 feet south of and parallel to W. North Boulevard; N. State Parkway; a line 368.5 feet south of and parallel to W. North Boulevard; the alley next east of N. Dearborn Parkway; a line 458.5 feet south of W. North Boulevard; N. State Parkway; W. Burton Place; the alley next west of N. Dearborn Parkway; a line 275 feet north of W. Burton Place; N. Dearborn Parkway; a line 350 feet north of W. Burton Place; and the alley next west of N. Dearborn Parkway

to those of an R5 General Residence District.

That the Chicago Zoning Ordinance be amended by changing all the R6 and R7 General Residence District symbols and indications as shown on Map No. 3-F in the area bounded by

W. Burton Place; N. State Parkway; a line 78.8 feet south of W. Burton Place; the alley next east of N.

Dearborn Parkway; a line 203.8 feet south of W. Burton Place; N. State Parkway; a line 353.8 feet south of W. Burton Place; the alley next east of N. Dearborn Parkway; a line 180 feet north of W. Schiller Street; N. Dearborn Parkway; a line 105 feet north of W. Schiller Street; the alley next east of N. Dearborn Parkway; W. Schiller Street; and the alley next west of N. Dearborn Parkway

to those of an R5 General Residence District.

That the Chicago Zoning Ordinance be amended by changing all the R6 and R7 General Residence District symbols and indications as shown on Map No. 3-F in the area bounded by

W. Schiller Street; N. State Parkway; a line 285.83 feet north of W. Goethe Street; the alley next east of N. Dearborn Parkway; a line 224.77 feet north of W. Goethe Street; N. Dearborn Parkway; W. Goethe Street; the alley west of N. Dearborn Parkway; a line 261.82 feet north of W. Goethe Street; N. Dearborn Parkway; a line 368.84 feet north of W. Goethe Street; a line 156 feet east of N. Dearborn Street; a line 209.43 feet south of W. Schiller Street; N. Dearborn Street; a line 199 feet south of W. Schiller Street; the alley next west of N. Dearborn Parkway; a line 40 feet south of W. Schiller Street; and N. Dearborn Parkway

to those of an R5 General Residence District.

EXHIBIT 3

UNITED STATES DISTRICT COURT
Northern District of Illinois Eastern Division

Name of Presiding Judge, Honorable George N. Leighton
Cause No. 80 C 254 18 April, 1980

Steven L. Amdur v. The City of Chicago

ORDER

The court has examined the complaint and the materials submitted by the parties relevant to defendant's motion to dismiss the complaint, and concludes that a fair reading of the complaint reveals that the constitutional claims alleged therein are immaterial and made solely for the purpose of obtaining jurisdiction in this court. See *Insley* v. *Joyce,* 330 F.Supp. 1228, 1232 (N.D. Ill. 1971). Additionally, the allegations of arbitrariness and capriciousness are conclusory. Accordingly, the motion to dismiss is granted; this case is dismissed.

EXHIBIT 4

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 80-1682

STEVEN L. AMDUR,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, a municipal corporation,

Defendant-Appellee,

KARLE MEYER and NORTH DEARBORN ASSOCIATION,

Applicants for Intervention.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-C-254
George N. Leighton, Judge.

Argued October 29, 1980—Decided December 5, 1980*

Before FAIRCHILD, *Chief Judge,* and SWYGERT and SPRECHER, *Circuit Judges.*

PER CURIAM. This is an action challenging a Chicago zoning ordinance to limit growth in certain areas of the city by "downzoning," or reducing the size of buildings that may be constructed on certain parcels of land. The plaintiff, Steven Amdur, owns one such property in an area commonly known as the "near north side." He alleges that the zoning ordinance violates the Fifth and Fourteenth Amendments to the United States Constitution (and analogous provisions of the Illinois Constitution) and the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*

* This appeal originally was decided by unreported order on December 5, 1980. *See* Circuit Rule 35. The panel has decided to issue the decision as an opinion.

The district court ruled that the constitutional claims were immaterial and made solely for purposes of obtaining federal jurisdiction and dismissed the complaint. We affirm, but on grounds different from those relied on by the district court.

We believe that the district court had subject matter jurisdiction over the action. We further hold, however, that the complaint failed to state a constitutional claim under the recent Supreme Court decision in *Agins* v. *City of Tiburon,* 100 S.Ct. 2138 (1980). In that case, the Court held that there was no Fifth or Fourteenth Amendment violation under a remarkably similar fact situation. The City Council of Tiburon, California had passed a zoning ordinance to limit the amount of growth in the city by restricting the number of housing units that could be built per acre within the city. Appellants alleged that because they could no longer develop their five-acre tract as extensively as they had planned, the actions of the City Council amounted to an unconstitutional taking for public purposes without compensation. As in this case, appellants had not yet filed an application for a building permit, so the only question—and the only question here—was whether the mere enactment of the zoning ordinances constituted a taking. The Court held that they did not. "Although the ordinances limit development, they neither prevent the best use of appellants land, *see United States* v. *Causby,* 328 U.S. 256, 262, and n. 7 (1946), nor extinguish a fundamental attribute of ownership, *see Kaiser Aetna* v. *United States,* 444 U.S. at [179-180]." 100 S.Ct. at 2142. The Court noted that the appellants would be permitted to build as many as five houses on their five acres of residential property. Similarly, in this case Amdur may still build on his property. He simply may not construct as large a high-rise as he had planned. Under the holding in *Agins,* therefore, the allegations in plaintiff's complaint fail to state a Fifth Amendment claim.

Plaintiff attempts to distinguish the *Agins* decision. He claims that the Tiburon ordinance affected all

property owners in the relevant area equally, while the Chicago ordinance "downzoned" only certain parcels of land.[1] The Chicago ordinance, however, affects areas of the city that are already highly developed. The City of Chicago could not very well "downzone" land on which high-rises had already been constructed. The zoning ordinances in dispute here limit construction on every parcel not already developed beyond the limits in the new ordinance. The city could do no more than that.[2] There is no substantive distinction between this case and *Agins*. Plaintiff's complaint fails to state a constitutional claim.[3]

We affirm.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[1] Plaintiff makes this distinction the basis of an equal protection claim as well. For the reasons discussed herein, we find this claim to be without merit.

[2] While theoretically the city could have included the land where high-rises now stand—and left them as existing non-conforming uses—in view of the probable permanence of the existing high-rises, it is irrelevant to plaintiff's claim whether that land was included in the restricted zone.

[3] Plaintiff contends that the merits of his constitutional claim are *res judicata*, as they were decided in an action in the Circuit Court of Cook County two weeks after *Agins*. *Harris Trust and Savings Bank* v. *City of Chicago*, No. 79-L-23380 (June 24, 1980). We find the reasoning in *Agins* more compelling. Plaintiff also alleges that the zoning ordinances violate the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* He is not a member of the group that is allegedly the subject of discrimination, and he therefore lacks standing to raise such a claim. *Warth* v. *Seldin*, 422 U.S. 490 (19f5).

EXHIBIT 5

Unpublished Per Curiam Order
Judgment—Oral Argument

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 5, 1980

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

No. 80-1682

STEVEN L. AMDUR,

Plaintiff-Appellant,

vs.

THE CITY OF CHICAGO, a municipal corporation,

Defendant-Appellee,

KARLE MEYER and NORTH DEARBORN ASSOCIATION,

Applicants for Intervention.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-C-254
Judge George N. Leighton

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the order of this court entered this date.

EXHIBIT 6

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 8, 1981

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

STEVEN L. AMDUR,

Plaintiff-Appellant,

No. 80-1682

vs.

THE CITY OF CHICAGO, a municipal corporation,

Defendant-Appellee,

KARLE MEYER and NORTH DEARBORN ASSN.,

Applicants for Intervention.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-C-254
Judge George N. Leighton

On consideration of the petition for rehearing filed in the above-entitled cause by counsel for the plaintiff-appellant, all of the judges on the original panel having voted to deny the same,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

MAY 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1543

In the
Supreme Court of the United States
October Term, 1980

STEVEN L. AMDUR,
Petitioner,
vs.
THE CITY OF CHICAGO, a municipal corporation,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

SUPPLEMENTAL BRIEF OF PETITIONER

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1543

STEVEN L. AMDUR,

Petitioner,

vs.

THE CITY OF CHICAGO, a municipal corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

SUPPLEMENTAL BRIEF OF PETITIONER

ARGUMENT

This Supplemental Brief is filed pursuant to Rule 22(6) of the Rules of the Supreme Court of the United States. Petitioner believes that this Court's decision in *San Diego Gas & Electric Company* v. *City of San Diego,* ..... U.S. ....., 67 L.Ed.2d 551, ... S.Ct. ..... (1981) (No. 79-678, decided March 24, 1981) (hereinafter referred to as *San Diego*), and in particular the dissenting opinion of Mr. Justice Brennan, emphasizes the importance of granting Petitioner's Petition for Writ of Certiorari.

Petitioner's Complaint alleged that certain zoning ordinances enacted by Respondent, the City of Chicago, were arbitrary and capricious and denied him economically viable use of his land, and were therefore in violation of the Fifth Amendment to the United States Constitution.[1] In *Amdur* v. *City of Chicago,* 638 F.2d 37 (7th Cir. 1980) (hereinafter referred to as *Amdur*) the Court of Appeals for the Seventh Circuit held that Petitioner's Complaint failed to state a cause of action under the Fifth Amendment.

The *Amdur* opinion was based almost entirely on the Court of Appeals' interpretation of *Agins* v. *City of Tiburon,* 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980) (hereinafter referred to as *Agins*). The *Amdur* opinion reads, 638 F.2d at 38:

> We further hold, however, that the complaint failed to state a constitutional claim under the recent Supreme Court decision in *Agins* v. *City of Tiburon,* ..... U.S. ....., 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). In that case, the Court held that there was no Fifth or Fourteenth Amendment violation under a remarkably similar fact situation. . . . As in this case, appellants [in *Agins*] had not yet filed an application for a building permit, so the only question [in *Agins*] — and the only question here — was whether the mere enactment of the zoning ordinances constituted a taking. The Court held [in *Agins*] that they did not.

It is difficult to explain the decision without concluding that the Court of Appeals for the Seventh Circuit read, in *Agins,* a new rule of constitutional law — that the enactment of a zoning ordinance cannot, under any set of

---

[1] Petitioner's Complaint also alleged that said ordinances denied him equal protection of the laws and were therefore in violation of the Fourteenth Amendment to the United States Constitution.

facts, violate the Fifth Amendment — and that only the arbitrary application of a zoning ordinance by municipal officers, when a building permit is requested, can raise Fifth Amendment questions.

The complainants in *Agins* asked the California courts, and then the Supreme Court, to expand the relief available to victims of unconstitutional zoning ordinances. The right to relief was presumed; the issue was whether the constitution authorized compensation as an alternative, or in addition, to declaratory relief. The California Supreme Court ruled that only declaratory relief was available under the Fifth Amendment (*Agins* v. *City of Tiburon,* 24 Cal.3d 366, 598 P.2d 25 (Cal. S.Ct. 1979)). The issue was not reached by this Court for reasons more procedural than substantive.

The *San Diego* complainants also asked the California courts, and then this Court, to rule on inverse condemnation. The majority refused to reach the question because there was no final judgment: The California court had not yet found, as a matter of fact, that a "taking" had occurred. In his dissenting opinion, Mr. Justice Brennan argued that such a factual finding was precluded by a legal ruling, 67 L.Ed.2d at 565:

> . . . the [California court] held that the city's exercise of its police power, however arbitrary or excessive, could not *as a matter of federal constitutional law* constitute a "taking" under the Fifth and Fourteenth Amendments. . . . [emphasis in original]

What Justices Brennan, Stewart, Marshall and Powell believed had happened in *San Diego* is exactly what happened in *Amdur*. Petitioner's Complaint alleged that his property values, and ability to earn a reasonable return on his investment, had been destroyed by zoning

ordinances which met established criteria for arbitrariness and capriciousness — i.e., that an impermissibly-enacted zoning ordinance denied him economically viable use of his land. The Court of Appeals for the Seventh Circuit ruled, on the basis of *Agins,* that such allegations did not as a matter of law state a Fifth Amendment claim for relief. The issue was not compensability. The Court of Appeals swept away a constitutional barrier between police power and property rights and held that every zoning regulation was as a matter of law invulnerable to a Fifth Amendment challenge.

That the Court of Appeals misconstrued *Agins* is apparent from dissent in *San Diego* (in which Mr. Justice Powell, the author of *Agins,* joined), 67 L.Ed.2d at 570:

> . . . the California courts have held that a city's exercise of its police power, however arbitrary or excessive, cannot as a matter of federal constitutional law constitute a "taking" within the meaning of the Fifth Amendment. This holding flatly contradicts clear precedents of this Court. For example, in last Term's *Agins* v. *City of Tiburon,* 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980), the Court noted that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or [if it] denies an owner economically viable use of his land."

The *Amdur* decision cannot be explained, as the majority explained *San Diego,* as a failure to decide a factual question. In *Amdur*, the Court of Appeals for the Seventh Circuit ruled, on the pleadings, that a taking (or, for that matter, an "overzealous use of the police power") had not occurred as a matter of law. The decision threatens to erode a heretofore-existing constitutional

barrier between property rights and arbitrary and capricious regulatory legislation. Granting Petitioner's Petition for Writ of Certiorari will give this Court the opportunity to clarify a present uncertainty in federal constitutional law.

Respectfully submitted,

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By: .....
One of his attorneys

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Office-Supreme Court, U.
FILED
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ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1543

STEVEN L. AMDUR,

Petitioner,

vs.

THE CITY OF CHICAGO, a municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly limited its decision to the question of whether the rezoning ordinances constituted a "taking" under *Agins v. City of Tiburon*, 447 U.S. 255 (1980), due to failure of petitioner to seek a building permit before filing this lawsuit.

2. Whether the Court of Appeals properly exercised its discretion in denying petitioner leave to amend his complaint where petitioner chose not to amend after dismissal by the District Court, petitioner chose instead to stand on his pleading and appeal to the Court of Appeals and, only after an adverse ruling by the Court of Appeals, did he seek leave to amend in a petition for rehearing.

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In The

Supreme Court of the United States

October Term, 1980

No. 80-1543

STEVEN L. AMDUR,

Petitioner,

vs.

THE CITY OF CHICAGO, a municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the Court of Appeals in this case is reported as *Amdur v. City of Chicago*, 638 F.2d 37 (7th Cir. 1980).

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Petitioner, for a number of years, has owned and operated a five-story, 32-unit apartment building on the near north side of Chicago. Petitioner's property is located in a residential neighborhood. Petitioner alleges that the area in the vicinity of his property is characterized by the presence of high density residential structures.

From 1957 to September 12, 1979, petitioner's property as well as most of the other property in the area, was zoned under the R7 General Residential District zoning classification. The remaining property in the area was predominantly zoned under the R6 zoning classification.

In 1979, the City Council of the City of Chicago enacted a series of ordinances rezoning to the R5 zoning classification a number of parcels of land in the area, including petitioner's property. Land improved with high-rise structures was not rezoned since to do so would only create non-conforming uses. The net effect of the rezoning ordinances was to reduce the permitted density of the affected properties to the approximate level of their present use.

Petitioner does not contend that he is precluded from using his property in the manner in which it was used immediately prior to enactment of the ordinances. Instead, he alleges that the R5 rezoning diminished property values in the affected area and that, in particular, the value of his investment declined $400,000. He also alleges:

> "Under the R5 zoning Plaintiff will not be able to realize a reasonable return on his investment in that Plaintiff cannot economically remove the building thereon and replace it with an improvement permissable under R5 zoning."

(Complaint, par. 12). Petitioner admits he did not apply for a building permit before filing suit.

Petitioner concludes that the rezoning ordinances are unreasonable, arbitrary and capricious, that they take his property without just compensation, that they deny his right to equal protection under the law, and that they violate the Fair Housing Act. He seeks damages, a declaration that the rezoning ordinances are unconstitutional and therefore invalid, plus other unspecified relief.

B. PROCEDURAL HISTORY

Following commencement of the action on January 16, 1980, respondent moved to dismiss the complaint and filed a supporting brief arguing, *inter alia*, the following points: (1) Counts I through IV (the Constitutional allegations) fail to state a claim upon which relief may be granted, (2) Count V (the Fair Housing Act claim) contains only conclusory allegations upon information and belief and therefore should be stricken, (3) plaintiff does not have standing to litigate the Fair Housing Act claim because he does not allege that he is a member of

the racial class affected by the alleged violation, and (4) plaintiff's claims are nonjusticiable because he does not allege that he was denied a building permit for alternative use of his property. Petitioner filed a lengthy brief opposing the motion.

On April 18, 1980, the District Court granted the motion, dismissed the case, and held that the constitutional claims were "immaterial" and made solely for the purpose of obtaining federal jurisdiction. Implicit was a finding that the complaint failed to state a claim upon which relief could be granted.

Petitioner declined to file an amended complaint. He chose to stand on his pleading and appeal to the Court of Appeals. In the meantime, this Court decided *Agins v. City of Tiburon*. The Court of Appeals affirmed the District Court on the basis of *Agins*.

Thereupon, petitioner filed a petition for rehearing seeking, for the first time, leave to amend his complaint. The Court of Appeals having already decided the issues raised by petitioner, and petitioner having waived the opportunity to amend his complaint in the District Court, the petition for rehearing was denied on January 8, 1981.

SUMMARY OF ARGUMENT

1. The petition should be denied because it presents no question worthy of review by this Court. First, this Court recently decided the key substantive issue raised in the petition (*i.e.*, whether the rezoning ordinances constitute a "taking" requiring just compensation) in favor of the respondent city in *Agins v. City of Tiburon*. The decision below followed *Agins*. Second, petitioner does not present a "case or controversy" because he failed to seek a building permit before filing this lawsuit.

2. The Court of Appeals did not abuse its discretion in denying petitioner leave to amend his complaint, because he waived his right to do so in the District Court; he chose instead to stand on his pleading and appeal; and he did not seek leave to amend until his petition for rehearing, after he had lost not once but twice on the merits of his complaint. Second, leave to amend need not be granted where, as here, the plaintiff is not entitled to any relief under any facts which could be proved in support of his claim. Finally, petitioner's desire to amend his complaint by adding analogies to air rights condemnation is frivolous, at best.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals in this case is clearly correct. Moreover, the case raises no novel question of federal law, nor is there any conflict between circuit courts of appeals.

I.

THE COURT OF APPEALS PROPERLY LIMITED ITS DECISION TO THE QUESTION OF WHETHER THE REZONING ORDINANCES CONSTITUTED A "TAKING" UNDER *AGINS v. CITY OF TIBURON*, 447 U.S. 255 (1980), DUE TO FAILURE OF PETITIONER TO SEEK A BUILDING PERMIT BEFORE FILING THIS LAWSUIT.

The court below, relying upon this court's decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), held that plaintiff's complaint failed to state a cause of action. As observed by the Court of Appeals, the issues and factual circumstances presented to this court in *Agins* are virtually indistinguishable from the case at bar.

The crux of petitioner's claim is that (a) the Chicago near north zoning ordinances cause a diminution in value of his property and constituted a "taking" for which he is entitled to just compensation, and (b) such ordinances unreasonably discriminate against him because existing high-rises were not similarly down-zoned, in violation of the Fifth and Fourteenth Amendments. The District Court dismissed the complaint because "the constitutional claims alleged therein are immaterial" (i.e., without merit) and made solely for the purpose of obtaining federal jurisdiction. The Court of Appeals affirmed on the ground that the complaint failed to state a claim upon which relief may be granted, citing *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

In *Agins*, this Court upheld the constitutionality of a rezoning ordinance under facts nearly identical to the instant case. The plaintiff purchased prime real estate before it was rezoned; he planned to develop it with residential structures; before he could do so, the City rezoned the property such that the permitted number of homes and population density thereon was less than he anticipated; nevertheless, the current use of the property was unimpaired and plaintiffs could still develop the property for residential purposes; plaintiff failed to seek, much less exhaust, his administrative remedies by seeking a building permit; and the complaint was dismissed for failure to state a claim.

This Court decided that the *Agins* complaint could only attack the Tiburon ordinance as facially invalid. No concrete controversy was presented concerning the constitutionality of the zoning ordinance as applied because plaintiff had failed to submit to the responsible governmental authorities a plan for development of his property. Thus, the issue before this Court was "whether the mere enactment of the zoning ordinance constitutes a taking." 447 U.S. at 260. In answering this question in the negative a two-step constitutional test was enunciated and utilized by this court:

> "The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests [Citation] or denies an owner economically viable use of his land [Citation]." [447 U.S. at 260]

As to the first element, this Court, referring to its decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974), held that a legitimate governmental goal to be advanced by a rezoning ordinance is protection of City residents from such "ill-effects of urbanization as air and noise pollution, traffic congestion, destruction of

scenic beauty, and other demonstrated consequences of urbanization." 447 U.S. at 261, fn. 8.[1] As to the second element, this Court held that the mere reduction in value of plaintiff's land did not constitute a taking:

> "Although the ordinances limit development they neither prevent the best use of appellant's land

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[1] Many other decisions hold that mere diminution in value as the result of legislative enactment does not constitute a "taking." *Andrus v. Allard*, 444 U.S. 51, 66, 62 L.Ed. 2d 210, 100 S.Ct. 318 (1979) (prohibition against selling eagle feathers, which greatly reduced their value as well as owner's future profits, does not constitute a taking); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130, 57 L.Ed. 2d 631, 98 S.Ct. 2646 (1978), *reh. denied* 439 U.S. 883, 58 L.Ed. 2d 198, 99 S.Ct. 226 (1978) ("[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore have believed was available for development is quite simply untenable."); *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, n.8, 49 L.Ed. 2d 132, 96 S.Ct. 2358 (1976) (zoning referendum against high rises upheld); *Goldblatt v. Hempstead*, 369 U.S. 590, 592, 8 L.Ed. 2d 130, 82 S.Ct. 987 (1962) (zoning ordinance preventing beneficial use of property as a quarry, to which it previously had been devoted, upheld); *Hadacheck v. Los Angeles*, 239 U.S. 394, 60 L.Ed. 2d 348, 36 S.Ct. 143 (1915) (rezoning ordinance prohibiting operation of brickyard, which caused the value of owner's investment to drop from $800,000 to $60,000, upheld); *William C. Haas v. City & Cty. of San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied* 445 U.S. 922, *reh. denied* 446 U.S. 929 (1980) (rezoning ordinance, which adopted 40-foot height limitation, reduced population density from R5 to R3, thereby prevented owner's high-rise development after construction had begun, and caused the value of his property to diminish from $2,000,000 to $100,000, upheld). *See also Steel Hill Development, Inc. v. Town of Sanbornton*, 469 F.2d 956, 963 (1st Cir. 1972); *Oceanic California, Inc. v. City of San Jose*, 497 F.Supp. 962, 973-977, n.18 (N.D. Calif. 1980) ("economically viable" language in *Agins* does not intimate that the Taking Clause guarantees landowners an economic profit from use of their land; and allegation that each of the uses permitted under the plan would cost more to implement and maintain than the gross income therefrom would yield, is insufficient); 8 E. McQuillian, *Municipal Corporations* §25.44, p. 101 (3d ed., 1976).

> [citation] nor extinguish a fundamental attribute of ownership [citation]." [447 U.S. at 262]

The result below is entirely consistent with the decision of this Court in *Agins*. The rezoning ordinances imposed more stringent density restrictions than had been provided for in zoning ordinances passed in 1957. The purpose of the ordinances is to limit the growth rate of population density within manageable limits for city streets, services and facilities.

In *Berman v. Parker*, 348 U.S. 26 (1954), this Court defined the term "public welfare":

> "The concept of public welfare is broad and inclusive, [citation]. The values it represents are spiritual as well as physical, aesthetic as well, as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."

There can be no doubt that the rezoning ordinances substantially advance legitimate public purposes. Given the strong presumption that such exercises of the police power are constitutional, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 596 (1962) ("debatable questions as to reasonableness are not for the courts but for the legislature"), the decision of the Court of Appeals was entirely correct and need not be reviewed.

As to the second element in *Agins*, the instant rezoning ordinances do not deny petitioner the economically viable use of his property. He has owned and operated it as a rental building for numerous years, apparently satisfied with the income generated by the 32 apartments. That the investment value of the property may have been adversely affected certainly does not constitute a taking. In *Agins*, the landowner's investment in a

five-acre tract was similarly affected but not destroyed, when a rezoning ordinance reduced the maximum permissible development to five single family homes.

Moreover, the fact that a land use law injures some landowners more than others does not in itself constitute a taking. *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. at 135-136.

Actually, the complaint in this case is most striking for what it *fails* to allege. Petitioner does not contend he is prevented from possessing, renting, modifying or selling the property; he does not, and cannot, complain that his property has been taken over or appropriated by the City. Rather, he simply contends that he could not generate as great a profit from tearing down the old and building a new structure. Such allegations are clearly insufficient under *Andrus v. Allard,* 444 U.S. 51, 65-66 (1979).

Petitioner admits that he currently operates a five-story, 32-unit rental apartment building on the site (Complaint, par. 4). On their face, the rezoning ordinances do not prohibit construction of a new rental or condominium apartment building on petitioner's property. As held by the Court of Appeals:

> ". . . Amdur may still build on his property. He simply may not construct as large a high-rise as he had planned."

638 F.2d at 38.

As to petitioner's argument that the ordinances denied his right to equal protection, suffice it to say that the only basis for such claim is that existing high-rises were not rezoned. The only effect of rezoning the high-rises, however, would have been to create nonconforming uses which would not advance the legitimate purposes of the

ordinances. If anything, the omission of existing high-rises from the ordinances demonstrates the good sense and purpose of the legislation. As enacted, the ordinances do not prevent anyone from continuing the current use of his or her property. The Court of Appeals correctly decided the equal protection issue.

The petitioner concludes that the Court of Appeals misapplied in the case at bar the reasoning and rule enunciated in *Agins* (Petitioner's Brief, p. 10). Specifically, petitioner contends that the Court of Appeals interpreted the *Agins* decision to require, as a precondition to challenging the constitutionality of a zoning ordinance, an application for a building permit. However, the court below addressed the constitutional issue presented by petitioner's complaint. Because petitioner failed to apply for a building permit, the court below, as did this Court in *Agins*, limited its inquiry to the facial validity of the challenged ordinance. The many references in the petition which are *dehors* the record would perhaps be relevant to an inquiry as to the constitutionality of a zoning ordinance as applied. Yet petitioner disavows any intention of attacking the zoning ordinances as applied. Petitioner cites the Illinois Supreme Court decision in *LaSalle National Bank v. County of Cook*, 12 Ill. 2d 40 (Ill. S. Ct. 1957), and argues that the criteria for determining the constitutional validity of a zoning ordinance set forth therein demonstrates that the zoning ordinances presently under attack are arguably invalid. In *LaSalle National Bank* the court reviewed a holding of the Circuit Court of Cook County that a zoning ordinance was unconstitutional and invalid as applied. The criteria established in *LaSalle National Bank* are only relevant to an inquiry as to the constitutionality of a zoning ordinance *as applied*. In this case petitioner has failed to point to any language in the

zoning ordinances that arguably violates his constitutional rights.

Accordingly, this case is not concrete and fails to present a "case or controversy." It is undisputed that petitioner sought neither a building permit nor a zoning variance before filing this lawsuit. Therefore, he does not present a justiciable issue for prospective relief by the federal court. *See Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, n. 13, 49 L.Ed. 2d 132, 96 S.Ct. 2358 (1976); *Warth v. Seldin*, 422 U.S. 490, 504, 516-517, 45 L.Ed. 2d 343, 95 S.Ct. 2197 (1975).

Because there is no issue justifying the exercise of certiorari jurisdiction, the petition should be denied.

II.

THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING LEAVE TO AMEND THE COMPLAINT.

Petitioner implicitly concedes that the Court of Appeals may have correctly decided the case, by contending that the Court abused its discretion by denying him leave to amend. Such argument not only misconstrues the rulings below, it fails under petitioner's cited authorities.

The District Court dismissed the complaint because the constitutional claims were immaterial and were asserted only for the purpose of obtaining federal jurisdiction. Implicit was a finding that the complaint failed to state a claim upon which relief could be granted. That was the major issue briefed and argued in the trial court. The crucial fact is that petitioner waived his right to amend the complaint and, instead, appealed. The Court of Appeals carefully considered the parties' briefs and oral argument, followed *Agins v. City of Tiburon*, and affirmed the District Court's ruling as

to the insufficiency of the complaint. Thus, it was only after petitioner had lost *twice* that he sought leave to appeal. He did so in a petition for rehearing.

It is firmly estabished that, where the plaintiff stands upon his pleading rather than amending it, and appeals from a judgment of dismissal, he will not normally be permitted to amend either in the appellate court or in the trial court if the order of dismissal is affirmed. *See 222 East Chestnut St. Corp. v. Lakefront Realty Corp.*, 256 F.2d 513, 515 (7th Cir. 1958), *cert. denied* 358 U.S. 907 (1958). *See generally* 3 Moore, *Federal Practice* ¶15.11, p. 15-147 (2d ed. 1980). For this reason alone, the Court of Appeals quite properly denied the request for leave to amend.

It is equally established that leave to amend need not be granted even when timely requested, where "it appears to a certainty that plaintiff would not be entitled to any relief under any state of facts which could be proved in support of his claim." *Stern v. United States Gypsum*, 547 F.2d 1329, 1334 (7th Cir. 1977). *See also Halpert v. Wertheim & Co.*, 81 F.R.D. 734 (S.D.N.Y. 1979). This result was sanctioned in *Foman v. Davis*, 371 U.S. 178 (1962), where this Court noted that leave to amend should be granted, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject for relief . . ." 371 U.S. at 182 (emphasis supplied). Applying these principles to the case at bar, it is clear that the underlying facts are not a proper subject for relief, and that amendment would be futile.

The district and appellate courts carefully considered petitioner's claim and found it totally defective. The complaint was properly dismissed under *Agins v. City of Tiburon.* Petitioner now contends that, "any defect in his complaint, which may have caused the Court of Appeals

to perceive a factual similarity between his complaint and *Agins*, can be cured by more specific pleadings. Petitioner further believes "that any perceived defect in the allegations of *per se* impermissibility of the ordinances can, if this Court rules on the question discussed in Section C, *supra*, be cured by specific allegations as to the similarity between the ordinances and air rights condemnation." (Petition for Certiorari at 27-28).

It is thus apparent that any amendment to the complaint would neither add any new legal theory under which plaintiff could proceed, nor change any facts upon which the complaint is based. The Court of Appeals was adequately apprised of the relevant facts, and the contention that the addition of analogies to the complaint would somehow cure its legal insufficiency is frivolous. Where the amendment adds nothing to the complaint, denial of leave to amend is not an abuse of discretion. *Bouse v. Bussey*, 573 F.2d 548, 551 (9th Cir. 1977).

CONCLUSION

Respondent requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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